

# **Exhibit 5**

Eric C. Wilhelmsen  
Reston, VA

December 19, 2003

Page 246

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE SOUTHERN DISTRICT OF OHIO  
3                   Western Division (Dayton)  
4                   ----- x Civil Action  
5   THE PROCTOR & GAMBLE COMPANY, : No.: C-1-02-393  
6                   Plaintiff,       : Hon. Walter Herbert  
7                   vs.              : Rice (C.J.)  
8   THE COCA-COLA COMPANY,       : Hon. Sharon Ovington  
9                   Defendant.     : (Magistrate)  
10                  ----- x Volume 2  
11                  Reston, Virginia  
12                  Friday, December 19, 2003  
13                  Continued Videotaped Deposition of ERIC C.  
14                  WILHELMSEN, PH.D., a witness herein, called for  
15                  examination by counsel for Plaintiff in the  
16                  above-entitled matter, pursuant to notice, the  
17                  witness being duly sworn by KAREN YOUNG, a Notary  
18                  Public in and for the Commonwealth of Virginia,  
19                  taken at the offices of Hale and Dorr, 11951 Freedom  
20                  Drive, Suite 1400, Reston, Virginia, at 11:32 a.m.  
21                  on Friday, December 19, 2003, and the proceedings  
22                  being taken down by Stenotype by KAREN YOUNG, and  
                        transcribed under her direction.

ORIGINAL

Eric C. Wilhelmsen

Reston, VA

December 19, 2003

Page 297

1       A.     To the extent the claims are construed to  
2     cover product not requiring added acid, it is my  
3     opinion that the claims are invalid for failing to  
4     contain a written description of such a product.

5       Q.     And where are you reading from?

6       A.     This is paragraph 49 of my report.

7       Q.     Okay. And the condition that you just  
8     read -- that is the claim construction advocated by  
9     Proctor & Gamble, isn't it?

10      A.     The claim construction represented by  
11     Proctor & Gamble -- you tell me. That's what I  
12     understand it to be, but --

13      Q.     That's your understanding of the claim  
14     construction advocated by Proctor & Gamble, isn't  
15     it?

16      A.     Yes.

17      Q.     And given that claim construction, it's  
18     your opinion that the 847 patent lacks a written  
19     description, isn't it?

20      A.     Yes, paragraph 49.

21      Q.     Now, to be clear though, even in your  
22     opinion, there is an adequate written description in

Eric C. Wilhelmsen

Reston, VA

December 19, 2003

Page 298

1 the 847 patent for a calcium-supplemented fruit  
2 juice with added acid.

3 A. I did not bring up any arguments about an  
4 adequate written description in that other case.

5 Q. In the case where if the 847 patent were  
6 limited to calcium-supplemented fruit juice with  
7 added acids, in your opinion, would there be  
8 adequate written description?

9 A. Yes, to the extent that the examples and  
10 all that provided, I would think it would be in the  
11 realms of patents that I have read before, so that's  
12 not a question that I have rendered a specific  
13 opinion on. I don't -- but I would say yes.

14 Q. You agree with me, do you not, that the  
15 claims of the 847 patent are product claims?

16 A. In this context, Counsel, what do you mean  
17 by a product claim?

18 Q. As opposed to a method claim. Does that  
19 terminology mean anything to you?

20 A. Yes, I do understand -- I have had  
21 explained to me the difference, but the prosecution  
22 history of this patent with its splitting makes that

Eric C. Wilhelmsen

Reston, VA

December 19, 2003

Page 305

1 understanding is as I quoted from my report. That  
2 was the basis that I used.

3 Q. When you formed your opinion about the --  
4 whether or not the 847 patent has an adequate  
5 written description, did any attorney tell you that  
6 if the patent describes at least one method of  
7 obtaining the claimed product, that it has an  
8 adequate written description?

9 A. That is a detail that I cannot answer yes  
10 or no to.

11 Q. You don't recall being told that?

12 A. That is a detail that I don't recall. I  
13 can't say yes or no. I'm sorry. That's more  
14 specific.

15 Q. Fair enough, but I want to focus a little  
16 bit on what you think is lacking in the written  
17 description of the 847 patent. Do you agree that  
18 there is an adequate written description in the 847  
19 patent -- strike that. Let's look at claim 1 of the  
20 847 patent. Do you agree that there is an adequate  
21 written description for a single strength fruit  
22 juice beverage?

Eric C. Wilhelmsen

Reston, VA

December 19, 2003

Page 306

1           A.     Those words are relatively customary.  
2     Obviously you want things in context. You have to  
3     be very careful when you choose a word. If I tell  
4     you or ask you are you going to pick up the check,  
5     there's obviously two meanings, but single strength  
6     fruit juice beverage -- those are relatively common  
7     words. We've had some discussion already about what  
8     a beverage is, and we could go through and repeat  
9     that discussion if you think it's important.

10       Q.     Is it your opinion that the phrase -- the  
11     term -- strike that. Is it your opinion that the  
12     claim element "A single strength fruit juice  
13     beverage" lacks adequate written description?

14       A.     No, I can -- I can interpret it.

15       Q.     Okay.

16       A.     I have.

17       Q.     I'm sorry. Is it your opinion that the  
18     claim element "Substantially free of added protein"  
19     lacks an adequate written description?

20       A.     The patent is not as clear as I would  
21     like. The concept is pretty clear! You go into the  
22     specification, they talk about this tenth percent,

Eric C. Wilhelmsen

Reston, VA

December 19, 2003

Page 307

1       but it's not as clean as it might be, but the intent  
2       of excluding products with we'll call it dairy  
3       proteins added based on the prior art seems  
4       apparent.

5           Q.     So is it your opinion that it lacks an  
6       adequate written description?

7           A.     Depends on how you're slicing and dicing  
8       on what's adequate. I think the inventor has  
9       conveyed enough information that you can understand  
10      that he was asserting products that did not have  
11      added protein. I go back to the original  
12      understanding I was giving, must reasonably convey  
13      to one of ordinary skill in the art the inventor was  
14      in possession of the invention at the time the  
15      application was filed. He is talking about products  
16      where somebody is using other than dairy proteins.

17           Q.     Do you intend at trial in this matter,  
18      Doctor, to offer the opinion that "Substantially  
19      free of added protein" lacks adequate written  
20      description?

21           A.     No, it's not a serious bone of contention  
22      in this matter. I don't expect to, but if --

Eric C. Wilhelmsen

Reston, VA

December 19, 2003

Page 310

1 made so fine as to avoid the grittiness.

2                 If somebody was using a similar product in  
3 a juice product, the concept of solubilized becomes  
4 confusing. It would be something that would not  
5 have been anticipated at the time Heckert wrote this  
6 patent. These are new ingredients. But do I expect  
7 to testify in this way? Not with the facts in front  
8 of me.

9                 Q.     Have you formed the opinion, Doctor, as  
10 you sit here today, that the claim element "With  
11 between point 05 and point 26 percent by weight  
12 solubilized calcium" lacks an adequate written  
13 description?

14          A.     In the context of our discussions, I have  
15 found no reason to challenge the methodologies used.

16          Q.     Have you formed the opinion that the claim  
17 element "At least 45 percent fruit juice" lacks an  
18 adequate written description?

19          A.     No.

20          Q.     Have you formed the opinion that "With a  
21 sugar content of between two degrees and 16 degrees  
22 Brix" lacks an adequate written description?

Eric C. Wilhelmsen

Reston, VA

December 19, 2003

Page 311

1           A.     The language of the patent is not as  
2     specific as it should be. That statement should say  
3     "sugars" perhaps, because you have the problem that  
4     sugar in usage is often sucrose as opposed to  
5     glucose and fructose, and Brix doesn't measure  
6     exclusively sugars. It measures dissolved solids.  
7     It is commonly used to measure dissolved solids, but  
8     its impact by organic acids and other solutes.

9                 And so if you're going to use it exactly  
10   as written, there's some uncertainty. It has not  
11   been a major point of discussion in this patent, so  
12   here again, I don't expect to be rendering  
13   testimony, but if asked about the precision of the  
14   method, yes, I have concerns.

15          Q.     As you sit here today, Doctor, have you  
16   formed the opinion that the claim element "With a  
17   sugar content of between two degrees and 16 degrees  
18   Brix" lacks an adequate written description?

19          A.     I can -- we can talk about products where  
20   it would generate indefiniteness, but they're not in  
21   contention in this discussion, and so I don't expect  
22   to render an opinion of that nature in this case.

Eric C. Wilhelmsen

December 19, 2003  
Reston, VA

Page 312

1 Q. Have you formed an opinion that the claim  
2 element "Less than point 07 percent by weight  
3 chloride ion" lacks an adequate written description?

4 A. No.

5 Q. So am I correct in understanding that the  
6 key element missing, a written description, in your  
7 opinion is the acid component?

8 A. I would agree that that is the key focus  
9 of discussion.

10 Q. Would you agree, Doctor, that in  
11 determining whether or not there's an adequate  
12 written description for a claim element, one  
13 considers not only the specification, but also the  
14 original claims as they were filed with the patent  
15 office? Has anybody ever explained that to you?

16 A. No.

17 Q. In determining whether or not the claims  
18 of the 847 patent have an adequate written  
19 description, did you consider the original claims  
20 that were filed with the original application that  
21 led to the 847 patent?

22 A. No.

Eric C. Wilhelmsen

Reston, VA

December 19, 2003

Page 335

1 patent has to enable every method of making the  
2 claimed invention or only one method of making the  
3 claimed invention or some other understanding?

4 A. The legal standard is what I just read.

5 That's what I was using.

6 Q. So you didn't have any understanding on  
7 the question I'm asking?

8 A. Repeat your question one more time.

9 Q. When you formed your opinion that the 847  
10 patent was not enabled, did you have any  
11 understanding about whether or not the law requires  
12 that every method of obtaining the claimed product  
13 must be enabled or only one method has to be enabled  
14 or some other understanding?

15 A. I do not recollect a specific discussion  
16 of those points. I may have heard it. This is what  
17 I relied on for my opinion.

18 Q. Okay. You do not dispute, do you, Doctor,  
19 that at a minimum, the 847 patent enables the premix  
20 method of manufacturing the claimed products, right?

21 A. To the extent that the premix includes  
22 added citric acid and added malic acid, no.

Eric C. Wilhelmsen

Reston, VA

December 19, 2003

Page 336

1 Q. So under your claim construction, the 847  
2 patent is enabled, right?

3 A. Well, no, actually, let's -- let's go back  
4 and we should look at the section K of my report  
5 where even if the Coca-Cola claim construction is  
6 accepted, that then -- I think I have the right  
7 section. No, that was the wrong section.

8 Q. Are you on I, if you look on page 39 --

9 A. Yes.

10 Q. That's obviousness.

11 A. Obviousness, okay.

12 Q. My question has nothing to do with  
13 obviousness. My question is about enablement,  
14 Doctor. You've offered the opinion that the claims  
15 of the 847 patent are not enabled under P&G's claim  
16 construction, right?

17 A. Uh-huh.

18 Q. My question is under your claim  
19 construction, is the 847 patent enabled.

20 A. I think so.

21 Q. Do you understand that P&G's claim  
22 construction excludes from the scope of the patent